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PACIFIC BELL TELEPHONE COMPANY,
15 doing business as AT&T CALIFORNIA

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18

19	PACIFIC BELL TELEPHONE COMPANY,)	No. C 05-04723 MMC
20	a California corporation doing business as)	<u>AT&T'S MOTION FOR SUMMARY</u>
	AT&T CALIFORNIA,)	<u>JUDGMENT ON THE FIRST, THIRD</u>
21	Plaintiff and Petitioner,)	<u>AND NINTH CLAIMS FOR RELIEF</u>
22	vs.)	
23	THE CITY OF WALNUT CREEK and THE)	[Fed. R. Civ. P. 56 and Local Rule 16-5]
24	CITY COUNCIL OF THE CITY OF)	Date: April 21, 2006
	WALNUT CREEK,)	Time: 9 a.m.
25	Defendants and Respondents.)	Courtroom: 7, 19th Floor
26)	[Hon. Maxine M. Chesney]
27)	

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1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 PLEASE TAKE NOTICE that on April 21, 2006 at 9:00 a.m., or as soon thereafter as
3 the matter may be heard before the Honorable Maxine M. Chesney, in Courtroom 7 of the
4 above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, plaintiff
5 and petitioner PACIFIC BELL TELEPHONE COMPANY, doing business as AT&T
6 California (“AT&T”), will and hereby does move for summary judgment, pursuant to Local
7 Rule 16-5 and Rule 56 of the Federal Rules of Civil Procedure, on the first claim for relief
8 (for declaratory judgment based on preemption under § 253 (“§ 253”) of the federal
9 Telecommunications Act of 1996 (the “Telecom Act”), 47 U.S.C. § 151 *et seq.*); on the third
10 claim for relief (for declaratory judgment that AT&T’s state franchise under California
11 Public Utilities Code § 7901 (“§ 7901”) entitles AT&T to use its telephone lines to transport
12 IP video services in addition to traditional voice services without a franchise, and that the
13 § 7901 franchise satisfies the franchise requirements under 47 U.S.C. § 541, to the extent
14 applicable); and on the ninth claim for relief (for a declaration and judgment, and a writ of
15 mandate, that AT&T’s state franchise under § 7901 entitles AT&T to use its telephone lines
16 to transport IP video services in addition to traditional voice services without a franchise).
17 This motion is based on this notice of motion and motion; the memorandum of points and
18 authorities that follows; the administrative record of the proceedings before the City of
19 Walnut Creek previously lodged with the Court;¹ and on such matters as may be presented to
20 the Court upon the hearing on this motion.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 I. INTRODUCTION.

23 The City of Walnut Creek (“Walnut Creek” or “the City”) seeks to change the rules
24 under which AT&T has been operating in California for nearly a century. As a telephone
25 corporation, AT&T has a statutory franchise under § 7901 to construct, maintain and operate

26 _____
27 ¹ See Notice of Lodging of Record of Proceedings, dated February 27, 2006. Citations to
28 the record are made to the bates-stamped designation (for example, “AR 0001” refers to
page 1 of the record).

1 its telephone lines within the public rights-of-way. Under long-standing authority, AT&T
2 does not lose its franchise right because its lines will be used to transmit video services,
3 along with other traditional voice services, as long as it does not “incommode the public
4 use.” The City’s authority is limited to reasonable controls over the time, place and manner
5 in which the public rights-of-way are accessed. The City, however, has refused to allow
6 AT&T to improve its telecommunications network by imposing a restrictive permit condition
7 that has nothing to do with the City’s management of the rights-of-way. This action by the
8 City violates both state and federal statutes prohibiting local interference with telecommuni-
9 cations services. The undisputed material facts, as contained in the administrative record,
10 establish that the City’s action is preempted and invalidated under both § 253 and § 7901.

11 Section 253(a) preempts all local government regulation that “may prohibit or have
12 the effect of prohibiting” the provision of telecommunications services. AT&T sought to
13 improve its network in Walnut Creek so that residents could receive a broad range of benefits
14 that will be available with new technologies that AT&T plans to deploy. The City, however,
15 has interposed itself as a “gatekeeper” on what services AT&T can provide via its network.
16 The City demanded that AT&T accept a condition on the encroachment permit at issue that
17 AT&T would not provide Internet Protocol (“IP”)-based video services over its network,
18 after enhancements are complete, without agreeing to a local “cable franchise agreement”
19 (the “Franchise Condition”).

20 This Franchise Condition is preempted under § 253 for two reasons. First, it may
21 have a prohibitive effect on AT&T’s delivery of telecommunications services because it
22 denies residents the ability to choose one type of communications product (video), while
23 purporting to permit others (voice, data, Internet) that are carried over the same network and
24 delivered to consumers over ordinary telephone lines. Second, municipalities are not free to
25 exercise discretion or assert dominion over which *services* are offered by telephone
26 companies. By attempting to control AT&T’s right to enhance its network based on a
27 particular service, the City has exceeded its limited right to manage AT&T’s physical use of
28 the rights-of-way.

1 The City’s actions are also preempted by § 7901. Under long-standing principles of
2 state law, AT&T does not require municipal consent to install, operate or improve its
3 telecommunications network. In California, that consent—or franchise—is extended by the
4 State through § 7901 for the benefit of telephone companies and the customers they serve.
5 The § 7901 franchise contains no limit on the *type* of communications that can be carried
6 over a telephone company network. Rather, a long line of well-reasoned cases establishes
7 that § 7901 authorizes AT&T to use its telephone lines to deliver *any* form of electronic
8 communications, including video programming, without the necessity of obtaining any
9 separate “cable franchise” from the City.

10 Because the City’s actions unmistakably conflict with these established principles of
11 federal and California law, the Court should grant summary judgment for AT&T on its first,
12 third and ninth claims.

13 II. BACKGROUND.

14 AT&T and its predecessors have provided communications services to customers in
15 Walnut Creek for over 90 years. AR 0383 (¶ 1). AT&T now serves over 67,000 residential
16 and business customers in the City. AR 0259 (¶ 2). Historically, AT&T provided local
17 telephone exchange services transmitted over twisted-pair copper wires placed on overhead
18 poles or in underground conduit. In recent years, AT&T has upgraded its network by
19 installing new fiber optic cable that carries greater communications traffic at higher speeds.
20 AR 0259 (¶ 4); AR 0383.

21 With the advent of “broadband” services by which customers can access the Internet
22 through high-speed connections, AT&T expanded its deployment of fiber optic cable.
23 AR 0260 (¶ 5). With these improved facilities, AT&T has expanded its services to include a
24 mix of voice telephony (including three-way calling, caller ID, voicemail and video
25 telephoning) and Internet backbone and DSL Internet access services. AT&T has been able
26 to provide this array of integrated services to businesses and residential customers in Walnut
27 Creek by installing, maintaining and upgrading its telephone lines and related facilities
28 within public rights-of-way pursuant to its long-standing franchise rights under § 7901. As

1 the City recognizes, “California Public Utilities Code Section 7901 gives [AT&T] a right to
2 install ‘telephone lines’ throughout the state.” AR 0415 (¶ 1).

3 In October 2004, AT&T announced Project Lightspeed, a capital improvement
4 project to significantly increase the efficiency and capacity of AT&T’s telephone lines.
5 AR 0261 (¶ 8); AR 0387. In completing Project Lightspeed, AT&T and its affiliated
6 companies will invest approximately \$4 billion over the next two to three years to upgrade
7 existing facilities and deploy 38,000 miles of fiber optic cable to increase bandwidth and
8 throughput speeds throughout the 13 states served by AT&T, including California. AR 0261
9 (¶ 8). As part of this work, AT&T will install upgraded facilities to support the communi-
10 cations services that it currently provides, as well as new IP-based services, including IP
11 video services. AR 0261 (¶ 9). *See also* AR 0393 (“The additional fiber and technology will
12 become part of the entire SBC communications network, and will carry both traditional and
13 newer technology based services by telephone or other customer owned devices.”);
14 AR 0643:19-20 (“Existing copper wire will carry ultimately the bandwidth over which
15 Lightspeed services are provided.”); AR 0287 (“Project Lightspeed facilities will carry
16 traditional voice services as well as DSL, high speed data and other broadband services.”).

17 In deploying Project Lightspeed, AT&T needs to maintain and repair existing
18 telephone lines and install new cable and facilities in public rights-of-way in Walnut Creek.
19 In addition to extending fiber optic cable further into the neighborhoods, AT&T will
20 “condition” its existing twisted-pair copper wires, which typically extend the last few
21 thousand feet from the fiber-fed node to the customer premises. AR 0264 (¶¶ 13-14). This
22 requires the removal, in some locations, of equipment known as “bridge taps” and “load
23 coils” that had been placed on the lines in earlier years to extend analog voice grade
24 telephone service, but which are no longer necessary and can have the effect of degrading
25 service quality and performance of the current communications network. Removing this
26 equipment will facilitate the transmission of AT&T’s *existing* DSL-delivered broadband,
27 voice and other telecommunications services, as well as its provision of a suite of new, IP-
28 based services over these lines. AR 0264 (¶ 13). *See also* AR 0246 (“Removing these

1 electronics also will facilitate the transmission of ABC's existing DSL broadband and voice
2 services.").

3 On June 7, 2005, AT&T applied to the City for an encroachment permit to perform
4 line conditioning work on overhead wires along one block of Walnut Avenue. AR 0276.
5 The application noted that the work was related to Project Lightspeed. On June 21, 2005, the
6 City issued an encroachment permit, Permit No. EP05-0434, for the work. AR 0276-77.
7 Attached to the permit was a special rider entitled "Additional Permit Conditions for Project
8 Light Speed [sic]" containing the Franchise Condition:

9 By accepting this permit, SBC agrees on behalf of itself and its affiliates that
10 it will not provide video programming (including but not limited to
11 programming delivered using internet protocol) over facilities located with
12 [sic] the City's rights-of-way to subscribers within the City *without first*
obtaining a cable franchise or an open video system franchise from the City.
(Emphasis added).

13 AT&T immediately disputed the legality of the franchise condition. AR 0286-0287.
14 On July 1, 2005, AT&T filed an administrative appeal of the Franchise Condition with the
15 City Council, pursuant to Walnut Creek Municipal Code § 7-1.107. AR 0290. On
16 October 18, 2005, the City Council held a hearing on the appeal (AR 0593-0692), received
17 written submissions and oral testimony (AR 0243-0393, 0398-0447), and adopted a
18 resolution denying AT&T's appeal. AR 0694-0697. AT&T filed this action 30 days later.

19 III. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR AT&T
20 ON ITS § 253 CLAIM.

21 AT&T's first claim is for declaratory judgment based on preemption under § 253 of
22 the Telecom Act. Compl. ¶¶ 36-43. Because preemption is a matter of law (*Industrial Truck*
23 *Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997)), preemption claims are routinely
24 resolved on summary judgment. That is particularly true for preemption claims based on
25 § 253. *E.g., Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006)
26 (affirming summary judgment for Qwest on its § 253 challenge to city ordinance); *Sprint*
27 *Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886 (S.D. Cal. 2005) (granting
28 summary judgment on § 253 claim, finding that ordinance was preempted).

1 A. Congress Has Preempted Local Regulation Under § 253 in Order to
2 Encourage Rapid Deployment of New Telecommunications Facilities and
3 Technologies.

4 The primary purpose of the Telecom Act was “to reduce regulation and encourage the
5 rapid deployment of new telecommunications technologies.” *Reno v. ACLU*, 521 U.S. 844,
6 857 (1997). *See also Qwest Communications Inc. v. City of Berkeley*, *supra*, 433 F.3d at
7 1255 (“the purpose of the act was to reduce regulation of telecommunications providers by
8 creating a ‘procompetitive, de-regulatory national policy framework’”) (quoting H.R.Rep.
9 No. 104-458 (1996) (Conf.Rep.)). In striking down local efforts to impede the installation of
10 new fiber optic networks, the Federal Communications Commission (“FCC”) has stressed
11 that “the administration of the public rights-of-way should not be used to undermine the
12 efforts of either cable or telecommunications providers to either upgrade or build new facili-
13 ties to provide a broad array of new services.” *In re TCI Cablevision of Oakland County*,
14 *Inc.*, 12 F.C.C.Rcd 21396, ¶ 78 (1997). Yet this is precisely what the City is attempting to do
15 in this case. The administrative record leaves no room for debate that Project Lightspeed will
16 enable residents of Walnut Creek to access new features and functionality through a more
17 powerful, multi-purpose IP-based broadband network. Equally clear is that the City has
18 improperly wielded its right-of-way authority to stop the Lightspeed build out.

19 Congress has sought to carry out this purpose by preempting local laws that conflict
20 with its deregulatory mandate. Exercising its powers under the Supremacy Clause (U.S.
21 Const. art. VI, § 2), Congress included an express preemption clause in § 253 of the Telecom
22 Act, providing that “[n]o State or local statute or regulation, or other State or local legal
23 requirement, may prohibit or have the effect or prohibiting the ability of any entity to provide
24 any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). Congress
25 assigned a limited role to municipalities in order to avoid a patchwork of local regulation that
26 would thwart national objectives. As the FCC has observed, a national framework is neces-
27 sary because “an array of local telecommunications regulations that vary from community to
28

community is likely to discourage and delay the development of telecommunications competition.” *In re TCI Cablevision of Oakland County, Inc., supra*, 12 F.C.C.Rcd 21396.²

The Ninth Circuit has held that the scope of federal preemption under § 253 “is virtually absolute and its purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena.” *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001) (internal citation and quotation omitted). As the Ninth Circuit recently reiterated, “[w]e have interpreted this preemptive language to be clear and ‘virtually absolute’ in restricting municipalities to a ‘very limited and proscribed role in the regulation of telecommunications.’” *Qwest Communications Inc. v. City of Berkeley, supra*, 433 F.3d at 1256. Thus, § 253 preempts not only regulations that prohibit outright the ability of an entity to provide telecommunications services, but also those that “may have the effect of prohibiting the provision of telecommunications services[.]” *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasis in original). With respect to public rights-of-way, the “narrowly circumscribed role is set forth in § 253(c). This ‘safe harbor’ clause permits state and local government control over the use of the rights-of-way, so long as the control is management of the rights-of-way itself and not control of the telecommunications companies with facilities in the rights-of-way.” *Qwest Communications v. City of Berkeley, supra*, 433 F.3d at 1256.

B. The Franchise Condition Will Affect Telecommunications Services.

1. AT&T is a telecommunications provider that seeks to upgrade its telephone lines to provide improved telecommunications services and new IP services.

To determine the preemption issue under § 253(a), the Court may consider whether the Franchise Condition “‘may have the effect of prohibiting the provision of telecommuni-

² As the FCC has ruled, § 253(a)’s preemptive scope is not limited to statutes or regulations, but includes any “legal requirement.” *See In re State of Minnesota*, 14 F.C.C.R. 21,697, ¶ 18 (1999) (§ 253(a) extends to agreement between State and developer requiring developer to dedicate fiber-optic cable to state and granting exclusive access to developer). Clearly, it applies to the Franchise Condition the City has imposed here.

1 cations services.” *Qwest Communications Inc. v. City of Berkeley*, *supra*, 433 F.3d at 1257
2 (quoting *Qwest Corp. v. City of Portland*, 385 F.3d at 1241). There is no dispute that AT&T
3 is a telecommunications company and the principal provider of telecommunications services
4 in Walnut Creek.³ Those services include local and long distance voice service, private line
5 data services (such as DS1 and DS3 lines), advanced data services such as ATM and frame
6 relay, operator services, 911, special switched access services, Internet access and more.
7 AR 0388. AT&T provides these telecommunications services over its existing network
8 facilities, including aerial and underground twisted pair copper wires and fiber optic cable.

9 Through Project Lightspeed, AT&T seeks “to upgrade its network in portions of its
10 service territory.” AR 0694 (¶ 2). *See also* AR 0384 (¶ 1) (“Project Lightspeed will involve
11 enhancements to the existing network in both the outside plant and in SBC’s central offices
12 and inter-office network”). As the City recognized, this upgrade includes “constructing
13 *telecommunications facilities* within the public rights-of-way as part of Project Lightspeed.”
14 AR 0411 (emphasis added). *See also* AR 0413 (“SBC has applied for encroachment permits
15 to begin constructing *telecommunications facilities*”) (emphasis added). In imposing the
16 Franchise Condition, the City relied in part on its “Telecommunications Policy” (*see*
17 AR 0609:24-0618:25), under which it believed it had the right to “regulate telecommuni-
18 cations” in order “to promote the widest availability possible to telecommunications
19 services” and “receive fair compensation for the use of public rights-of-way by telecommuni-
20 cations providers.” AR 0415.

21 The City also recognized that, in addition to constructing telecommunications
22 facilities, Project Lightspeed involves maintaining and rehabilitating, or “conditioning,”
23 existing facilities. *See* AR 0428 (¶ 3) (“Project Lightspeed work will also include
24 ‘conditioning’ work on existing lines, such as removing copper bridges and other devices,
25 which is needed to help provide the additional system capacity.”). It was AT&T’s

26 ³ A party provides “telecommunications services” when it offers “telecommunications for
27 a fee directly to the public, or to such classes of users as to be effectively available directly to
28 the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

1 application for a permit to “condition” existing telephone lines on Walnut Avenue that led to
2 the City’s imposition of the Franchise Condition—even though these lines have been (and
3 will continue to be) used for the transmission of telecommunications services, including
4 traditional voice telephone service. AR 0246, 0264 (§§ 13-14); 0267-0268 (§ 4); 0271-0272
5 (§§ 2, 4). As the City Council was advised, “the network operations in which we [AT&T]
6 are doing construction, maintenance, and rehabilitation work on our existing network does
7 involve the legacy communications services, including plain old telephone service, current
8 data services, dial-up Internet.” AR 0629:14-19.

9 Conditioning the existing phone lines would facilitate the transmission of telecom-
10 munications services in the future, including voice services. AR 0264 (§ 13) (“Removing
11 this equipment also facilitates the transmission of SBC’s existing broadband services, as well
12 as phone service.”). As the Assistant City Attorney admitted at the hearing, “[t]here will be
13 certain enhancements of the system for their other [i.e., non-video] services.” AR 0612:15-
14 613:11. Once the Project Lightspeed enhancements are complete, AT&T will provide all of
15 its services over the same network. AR 0388. As the City observed, “SBC *will be bundling*
16 its video programming services with telecommunications or information services such as
17 Internet and telephone services” AR 0696A (emphasis added). Thus, “Lightspeed will
18 utilize existing optical fiber within SBC’s backbone” (AR 0414) and “[e]xisting copper wire
19 will carry ultimately the bandwidth over which the Lightspeed services are provided.”
20 AR 0643:19-20.

21 When completed, Project Lightspeed upgrades will support AT&T’s provision of its
22 existing telecommunications services as well as its IP video service. The City Council was
23 advised by AT&T that “the video service that will be provided is going to be part of a host
24 of services that will include the traditional voice and other services that we’re already
25 providing, albeit in terms of new technologies provided by different and new means.”
26 AR 0637:15-19. While the City argues that Project Lightspeed will enable the provision of
27 certain IP-supported services not falling within the definition of “telecommunications,” the
28 essential (and undisputed) point is that the upgrade also will facilitate the provision of

1 services that indisputably are telecommunications. As explained at the hearing, Project
2 Lightspeed “is not synonymous with video. It is a project to enhance the existing network to
3 provide bigger pipes, more bandwidth so that we can provide a variety of services and
4 functions.” AR 0649:11-15. The undisputed evidence before the City Council established
5 that “Project Lightspeed is SBC’s plan to further upgrade its telecommunications network to
6 enable SBC to increase the amount of available bandwidth to resident and end users and in
7 turn provide a bundle of integrated communications services, such as voice, including Voice
8 Over Internet Protocol (‘VOIP’) service, High Speed Internet Access (‘HSIA’) and IP video
9 service.” AR 0383 (¶ 2).

10 2. Franchise requirements of the kind at issue here “may have the effect” of
11 prohibiting telecommunications services.

12 AT&T applied for an encroachment permit for network maintenance, rehabilitation
13 and enhancement, but was given a permit with a special condition that required AT&T to
14 accept classification of its telecommunications network as a cable television system subject
15 to a local cable franchise agreement. The City proposed that AT&T accept a 58-page
16 Franchise Agreement (AR 0295-0362) with numerous and onerous conditions. When
17 imposed as a condition to receive permits necessary for enhancements to a *telecommuni-*
18 *cations* network, this Franchise Agreement serves as a classic example of the sort of local
19 action that Congress sought to preempt under § 253. Under the proposed Franchise
20 Agreement, for example, AT&T would be required to submit to an architectural design
21 review process, agree to construction deadlines, comply with various tests and inspections,
22 adopt system requirements, comply with interconnection agreements, pay a 5% franchise fee,
23 agree to rate regulation, comply with review requirements, acknowledge the City’s right to
24 require the franchise, etc. A franchise condition which limits AT&T’s ability to maintain and
25 enhance its network without accepting burdensome municipal authority over that network
26 has no relationship to the management of the public rights-of-way, as is permitted under
27 § 253(c) and, in addition, “may have” sufficient prohibitive effect on AT&T’s provision of
28 telecommunications services to violate § 253(a). As the Ninth Circuit has observed, a

1 demand for a franchise agreement has “the effect of prohibiting such services” in violation of
2 § 253 because it creates “a substantial and unlawful barrier to entry into and participation in
3 the [cities’] telecommunications markets.” *City of Auburn, supra*, 260 F.3d at 1176. That
4 burden is even greater on statewide telecommunications providers, such as AT&T, who are
5 already subject to regulation by the California PUC. As explained at the City Council
6 hearing, “[w]hen you start looking at what is the burden, it is not just having to go through
7 the process of hammering out arrangements on a city-by-city basis, when you have over 500
8 local jurisdictions in California to deal with alone. It is the dual regulatory systems. We’re
9 already subject to regulation and oversight at multiple levels simply by virtue of being a
10 telecommunications company and providing telecommunications services.” AR 0637:4-14.

11 The Ninth Circuit recently reaffirmed that local governments may not impose onerous
12 conditions on a telephone corporation’s access to the rights-of-way. *City of Berkeley, supra*,
13 433 F.3d at 1257-58 (“[a]lthough not identical to the franchise application process in *Auburn*,
14 the exemption process in this case is similarly onerous, and therefore, has the same
15 discouraging effect”). *See also Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.
16 Supp. 2d 886, 895 (S.D. Cal. 2005) (regulatory scheme and use permit regulations found
17 preempted by § 253 in part because they included “burdensome submission requirements”);
18 *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1265 (S.D. Cal.
19 2002) (permit process has “the effect of prohibiting . . . telecommunications companies from
20 using the public rights-of-way” when it requires “a lengthy application process”).⁴

21

22

23 4 The Ninth Circuit’s holdings are consistent with numerous decisions elsewhere. *E.g.*,
24 *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002) (§ 253 was
25 violated where approval process for franchise under city ordinance suffered from “extensive
26 delays”); *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d 805, 814-15 (D. Md.
27 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000) (court
28 invalidated city ordinance substantially similar to Franchise Condition, holding that “any
‘process for entry’ that imposes burdensome requirements on telecommunications companies
and vests significant discretion in local governmental decision-makers to grant or deny
permission to use the public rights-of-way ‘may . . . have the effect of prohibiting’ the
provision of telecommunications services in violation of the [Act]”).

1 Issuing the permits without a franchise condition would have allowed AT&T to
2 upgrade its network facilities and offer its customers precisely the type of new telecommuni-
3 cations technologies that were anticipated by the Telecom Act. In fact, the record shows that
4 the franchise condition has caused AT&T to halt the build-out in Walnut Creek. AR 0265,
5 ¶ 16; *see also* AR 0630:16-17 (“we have shut down our Lightspeed deployment in Walnut
6 Creek”). As AT&T explained, “[w]e will not allow our network to be held hostage in this
7 manner. We will simply bypass Walnut Creek” AR 0673:14-16.

8 AT&T’s burden under § 253 is only to show its provision of such services “may be
9 prohibited,” a legal determination that can be made based on the terms of the Franchise
10 Condition and the Administrative Record. In *City of Portland*, the Ninth Circuit rejected the
11 argument that “Qwest was required to make an actual showing of ‘a single telecommuni-
12 cations service that it . . . is effectively prohibited from providing.’” 385 F.3d at 1241. “We
13 do not agree that Qwest was required to make an actual showing of a single telecommuni-
14 cations service that it . . . is effectively prohibited from providing. We have previously ruled
15 that regulations that *may* have the effect of prohibiting the provision of telecommunications
16 services are preempted.” *Id.* The same conclusion was reached by the Tenth Circuit in
17 *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258 (10 Cir. 2004). Finding that “[i]t is
18 enough that the [state or local requirement] would ‘materially inhibit’ the provision of
19 services,” the court held that a requirement that generates “substantial costs . . . meets the test
20 and is prohibitive under 47 U.S.C. § 253.” 380 F.3d at 1271.

21 Here, the same telephone lines are being used to transmit both telecommunications
22 services and multi-purpose IP-based services. Hence, a restriction that bars provision of
23 AT&T’s IP-video services (absent a franchise) may “have the effect” of causing AT&T (or
24 any other telecommunications provider) not to install and upgrade facilities that are used to
25 provide bundled telecommunications services. As we explain in section IV below, under
26 § 7901, AT&T has a state-wide franchise to use its telephone lines to provide additional
27 services along with traditional telephone services. A telecommunications carrier such as
28 AT&T should be allowed to integrate new services with its existing services without losing

1 its underlying protection as a carrier or suffering the unnecessary burden of an overlay cable
2 franchise.

3 The basic point is undisputed that in Walnut Creek, AT&T's existing and new
4 services will be transmitted over the same network. By conditioning AT&T's right to install
5 facilities used to transport both its existing communications services and IP-based services
6 over the same telephone lines, upon AT&T's agreement to enter into a cable franchise, the
7 City is interfering with and obstructing AT&T's ability—and right—to provide telecom-
8 munications services that depend on the same network enhancements. The City's actions
9 thus are a material impediment to AT&T's ability to timely modifying and upgrading its
10 facilities. If localities are permitted to demand franchises as a condition of permitting use of
11 the public rights-of-way, construction of new telephone lines may be discouraged and
12 deployment of telecommunications service to new customers inhibited, contrary to Congress'
13 basic mandate under the Telecom Act.

14 3. The City may not deny AT&T a permit based on factors unrelated to the
15 management or use of the rights-of-way.

16 A local regulation may have the effect of prohibiting telecommunications services
17 when the municipality's actions are based on factors that are unrelated to the physical
18 management of the rights-of-way. *City of Auburn, supra*, 260 F.3d at 1176, 1179 (in holding
19 that § 253 preempted regulations permitting city to “consider discretionary factors that have
20 nothing to do with the management or use of the rights-of-way,” the court noted that
21 “perhaps most problematic, the ordinances grant the [cities] unfettered discretion to insist on
22 unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed
23 factors”).

24 Walnut Creek is exercising discretion on whether to allow AT&T access to the public
25 rights-of-way to install and upgrade its telecommunications infrastructure that is used, and
26 will continue to be used, to deliver both traditional telecommunications services as well as a
27 variety of more advanced broadband, voice and Internet access services. By conditioning
28 access to the rights-of-way upon AT&T's agreement to a restriction that is not directly

1 related to the City’s management of AT&T’s physical use of the rights-of-way, the City acts
2 in derogation of § 253. *See, e.g., Qwest Communications v. City of Berkeley, supra*, 433 F.3d
3 at 1258-59 (municipal ordinances preempted by § 253(a) because they afforded “the City
4 significant discretion to deny the companies the ability of providing telecommunications
5 services[,]” and impermissibly regulated the carrier’s “technical and legal qualifications
6 rather than the actual management of the public rights-of-way itself”); *Cox Commc’ns*,
7 204 F. Supp. 2d at 1266 (under § 253, “[t]he courts have clearly said that local governments
8 do not have discretion to deny permits”).

9 C. The Franchise Condition Does Not Fall Within §§ 253(b) or (c).

10 The City cannot satisfy the “safe harbor” subsections of § 253. Subsection (b) by its
11 terms does not apply to the City (it applies only to states). Subsection (c) authorizes local
12 regulations only with respect to the physical use and management of the rights-of-way, but
13 does not permit local authorities to regulate either the carrier itself or its services. Not even
14 the City contends that the Franchise Condition is related to the physical management of the
15 rights-of-way. Moreover, subsection (c) does not authorize cities to deny permits to telecom-
16 munications providers for access to public rights-of-way based on discretionary factors
17 *unrelated to* the physical use and management of the rights-of-way. *E.g., City of Auburn*,
18 260 F.3d at 177 (“As the FCC has explained, right-of-way management means control over
19 the right-of-way itself, not control over companies with facilities in the right-of-way[.]”);
20 *accord Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1273 (10th Cir. 2004) (provisions of
21 city’s ordinance unrelated to “the management of the city’s rights-of-way . . . are not saved
22 from preemption by 253(c)”). By imposing a condition on SBC’s ability to upgrade its
23 communications network based on AT&T’s future services, rather than AT&T’s physical use
24 of the public rights-of-way, the City is improperly attempting to regulate a provider and its
25 services, which it is not authorized to do under § 253(c).

1 IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR AT&T
2 ON ITS THIRD AND NINTH CLAIMS FOR RELIEF

3 A. The City's Attempt to Locally Franchise AT&T's IP Video Services Is
4 Preempted by § 7901.

5 1. Section 7901 authorizes AT&T to install its telephone lines without a local
6 franchise.

7 AT&T's existing franchise from the State pursuant to § 7901, in and of itself, is
8 sufficient to authorize AT&T to construct and operate its facilities in the public rights-of-way
9 to provide *any* form of electronic communication, including IP video services, without
10 obtaining an additional local franchise from the City. Section 7901 provides in relevant part
11 that:

12 Telegraph or telephone corporations may construct lines of telegraph or
13 telephone lines along or upon any public road or highway . . . in such manner
 and at such points as not to incommode the public use of the road or highway.

14 Under the Public Utilities Code, the term “telephone line” is defined broadly to
15 include “*all* conduits and other real estate, fixtures and personal property used to facilitate
16 communication by telephone.” Cal. Pub. Util. Code § 233 (emphasis added). Thus, under
17 California law, any and all facilities used to “facilitate communication by telephone” are
18 “telephone lines,” regardless of whether such facilities are copper, fiber or some other
19 material. *See, e.g., Commercial Comms., Inc. v. Pub. Utils. Comm’n*, 50 Cal.2d 512, 523
20 (1958) (“[T]he medium over which the communication can be effected is not prescribed by
21 law.”). The Court of Appeal recently reiterated that a “fiber optic network is a telephone
22 line.” *Anderson v. Time Warner Telecom of Cal., Inc.*, 129 Cal. App. 4th 411, 415 (2005).

23 It is undisputed that AT&T's facilities are “telephone lines” because they are, and
24 will be, used to “facilitate communication by telephone.” AR 0393 (“The additional fiber
25 and technology will become part of the entire SBC communications network, and will carry
26 both traditional and newer technology based services by telephone or other customer owned
27 devices.”); AR 287 (“Project Lightspeed facilities will carry traditional voice services as well
28 as DSL, high speed data and other broadband services.”); AR 0643:19-20 (“Existing copper

1 wire will carry ultimately the bandwidth over which Lightspeed services are provided.”). In
2 fact, the City Attorney acknowledged in response to a question from a City Council member
3 that “if we were to take the position that they [AT&T] cannot even construct their system
4 without a franchise, not only would we be stopping them from building a cable system, *we*
5 *would be stopping them from installing what are truly telephone lines*. And therefore we
6 might run afoul of certain provisions of state law.” AR 0616:14-20 (emphasis added).

7 It is also undisputed that AT&T is a “telephone corporation” because it has been
8 managing and operating its telephone lines in California for more than a century. Cal. Pub.
9 Util. Code § 234 (a “telephone corporation” is “any corporation that owns, controls, operates
10 or manages a telephone line for compensation in California”). As such, AT&T possesses a
11 franchise under § 7901 in every place where it is maintaining and operating telephone lines.
12 *See County of Los Angeles v. Southern California Tel. Co.*, 32 Cal. 2d 378 (1948) (“Section
13 [7901] has been judicially construed by many [California Supreme Court] decisions . . . and
14 it has been uniformly held that the statute is a continuing offer extended to telephone and
15 telegraph companies to use the highways, which offer when accepted by the construction and
16 maintenance of lines constitutes a binding contract based on adequate consideration.”).

17 Because AT&T is a “telephone corporation” and its facilities constitute “telephone
18 lines,” AT&T is authorized under its § 7901 franchise to install and upgrade its facilities in
19 the public rights-of-way without obtaining any separate franchise from the City. *See, e.g.*,
20 *San Diego v. Southern California Tel. Corp.*, 42 Cal. 2d 110, 116-17 (1954) (“When a
21 telephone corporation obtains a franchise under section 536 [now Section 7901], *it need not*
22 *obtain a franchise from local authorities.*”) (emphasis added); *Western Union Telegraph*
23 *Co. v. Hopkins*, 160 Cal. 106, 119 (1911) (holding that the “state franchise included the right
24 to such exclusive occupation by the company of portions of the streets as is maintained for
25 the purpose of its system, *leaving nothing in that behalf to be granted by the municipality*”)
26 (emphasis added); *County of Inyo v. Hess*, 53 Cal. App. 415 (1921) (“[U]nder and by virtue
27 of the provision of [Section 7901], telephone corporations are granted the right and privilege
28 to use the public highways over which to construct and operate lines of telephone wires, *free*

1 *from any grant made by subordinate legislative bodies.”*) (emphasis added); 1976 Cal. Op.
2 Att’y Gen. 376 (1976), 1976 Cal. AG LEXIS 67, at *6 (1976) (“[W]hen accepted [the 7901
3 franchise] gives the utility a franchise to use all public highways *without the necessity of a*
4 *grant from a city or other subordinate governmental entity.”*) (emphasis added).

5 In light of § 7901, the City’s only power with respect to AT&T’s Lightspeed facilities
6 and services is to “exercise reasonable control as to the time, place, and manner in which the
7 roads, highways and waterways are accessed.” Pub. Util. Code § 7901.1; *Pac. Tel. & Tel.*
8 *Co. v. City and County of San Francisco*, 197 Cal. App. 2d 133, 152 (1961) (“[B]ecause of
9 the state concern in communications, the state has retained to itself the broader police power
10 of granting franchises, leaving to the municipalities the narrower police power of controlling
11 location and manner of installation.”).

12 2. AT&T is entitled to use its telephone lines interchangeably to provide any
13 form of electronic communications, including video programming

14 The City may argue that AT&T’s plan to use its telephone lines to provide additional
15 services, such as video programming, exceeds the scope of its § 7901 franchise. However,
16 the California Supreme Court rejected this argument more than 50 years ago. In *Pac. Tel. &*
17 *Tel. Co. v. Los Angeles*, 44 Cal.2d 272 (1955), a case involving AT&T’s predecessor Pacific
18 Telephone and Telegraph Company, the California Supreme Court held that under then
19 section 536 (now Section 7901) Pacific was “*entitled to use its lines interchangeably for*
20 *transmitting telephone messages, telegraph messages, teletypewriter messages, telephoto-*
21 *graphs, program services (including radio and television broadcasts) and any other*
22 *communication service* by means of the transmission of electrical impulses.” *Id.* at 281
23 (emphasis added). Indeed, the Supreme Court held that “[Section 7901], which authorizes
24 telephone companies to construct their lines along public highways, places *no restrictions*
25 upon what may be transmitted by means of electrical impulses over those lines.” *Id.* at 282
26 (emphasis added). The Court emphasized that requiring a state franchisee to obtain
27 additional local franchises in order to provide non-telephone services “would defeat the very
28

1 purpose of [Section 7901], as it would interfere substantially with the ability of telephone
2 companies to provide adequate communication service to the people of the state.” *Ibid.*

3 Four years later, in *Pacific Tel. & Tel. Co. v. San Francisco*, 51 Cal. 2d 766 (1959),
4 the Supreme Court confirmed that “that the construction and maintenance of telephone lines
5 in the streets and other public places within the city is today a matter of state concern and not
6 a municipal affair” (*id.* at 768), even though the lines in question were used to provide non-
7 telephone services such as the transmission of television programs. *Id.* at 772-73.

8 Accordingly, the Court held that “[Section 7901] gives a franchise from the state to use the
9 public highways for the prescribed purposes *without the necessity for any grant by a*
10 *subordinate legislative body*” (emphasis added).

11 In *Williams Communications, Inc. v. Riverside*, 114 Cal. App. 4th 642 (2003), the
12 California Court of Appeal reinforced the broad implications of these Supreme Court
13 decisions. In that case, Williams sought a refund of franchise fees paid to the City of
14 Riverside (as a condition of installing its telephone lines) on the ground that such fees were
15 prohibited under § 7901. The trial court ruled that Williams was not entitled to a refund,
16 holding that: (1) “[i]f a telephone company installs cables to be used for non-telephone
17 purposes, it is not protected by Public Utilities Code § 7901” and (2) “Plaintiff Williams . . .
18 had failed to disprove defendants’ position that the City could require a license agreement
19 because plaintiff’s cable would carry open video, cable TV, [and] Internet services which are
20 not subject to Public Utilities Code § 7901.” *Id.* at 649. The Court of Appeal reversed.
21 Adhering to the Supreme court’s *City of Los Angeles* and *San Francisco* decisions, the
22 *Williams* court held that “the fact that *other data is transmitted* over the telephone lines does
23 not deprive Williams of the protection afforded by section 7901,” adding that “[l]ocal
24 franchises are prohibited because ‘[t]he undisputed evidence in this case discloses that all the
25 communication services provided by the telephone company involve the transmission of
26 intelligence by electrical impulses through its lines.’” *Id.* at 654 (quoting *City of Los*
27 *Angeles*) (emphasis added).

1 The City argues in its motion to dismiss that AT&T's IP video service must be
2 classified as a "cable service" subject to local franchising under federal and state cable
3 television laws (Mot. to Dismiss, pp. 11-13); and that even if AT&T's IP video service is not
4 a cable service, the City still has residual municipal power to impose a franchise since no
5 federal law preempts regulation of video services as such (*id.*, pp. 13-15). The City ignores
6 the California decisions discussed above which categorically prohibit requiring § 7901
7 franchisees to obtain an additional local franchise in order to deliver any form of electronic
8 communications over their telephone lines. Moreover, neither California nor federal cable
9 law authorizes the City to franchise any services that AT&T may provide via its facilities.

10 B. California Cable Law Does Not Authorize the City to Franchise AT&T's
11 Video Services.

12 1. The cable franchising statute has no application to AT&T's facilities.

13 California statutes distinguish between cable television operators, which are subject
14 to local franchising obligations under Government Code § 53066 *et seq.*, and other types of
15 video providers, such as satellite broadcasters, which are not. In particular, § 53066(a)
16 authorizes cities to franchise only "the construction of a community antenna television
17 system." Similarly, § 53066(e) provides that "[n]o person may commence the construction
18 of a cable television system without a franchise or license granted by the city, county, or city
19 and county in which the cable television system will operate."

20 Section 53066, which authorizes cities to franchise the construction of systems in
21 public rights-of-way within their control, provides no authority for the City's actions.
22 Because AT&T received authorization from the State to construct its facilities in the public
23 rights-of-way, and to use those facilities to transmit any form of electrical impulse without
24 local franchising, § 53066 is plainly inapplicable. Moreover, on their face, these provisions
25 apply only to a system that is constructed from its commencement as a "cable television
26
27
28

1 system” or “community antenna television system.”⁵ Here, however, AT&T did not
2 construct its facilities as a cable system; it constructed its facilities as a telecommunications
3 network. As the California Supreme Court has indicated, these facilities remain a
4 “telecommunications network” even when the progress of technology means that video
5 programming now may be delivered over the same wires as basic telephone calls and other
6 telecommunications services.

7 Indeed, as reflected in *City of Los Angeles* and its progeny, telephone networks,
8 including AT&T, actually have been transmitting television signals for decades. No court
9 has held that this capability causes such facilities to lose their character as “telephone lines”
10 or transmutes them into cable systems subject to the cable television franchising laws.
11 AT&T’s Lightspeed enhancements will add capacity to AT&T’s telephone network and thus
12 improve its effectiveness in managing many capacity-intensive applications, including video.
13 But since AT&T’s network (like almost all telecommunications networks) already has the
14 capacity to transmit video, there is no basis to conclude that AT&T commences the
15 construction of a cable system simply by enhancing the capacity of its telecommunications
16 network in a manner that improves its existing capabilities.

17 2. The § 7901 franchise preempts any authority the City may otherwise have
18 under Government Code § 53066 et seq.

19 Even assuming that § 53066 were facially applicable to AT&T’s telephone lines, this
20 section does not effectively delegate the state’s franchising authority over such lines to the
21 City. Nor does it justify interposing the overlay of a city-by-city franchising regime upon
22 telephone companies for any services they may provide. No California case has held that
23 § 53066 authorizes a city to impose a cable franchise on the construction of lines installed
24 pursuant to a telephone company franchise under § 7901. Indeed, the only relevant authority
25 suggests that, in case of conflict between §§ 53066 and 7901, the latter must prevail.

26 ⁵ A “cable television system” is “a community antenna television system, under common
27 ownership and control, serving a franchise area or two or more contiguous or electronically
28 connected franchise areas.” Gov. Code § 53054.2(b).

1 See 46 Op. Att’y Gen. Cal. 22 (1965); 1965 Cal. AG LEXIS 44, at *3 (1965) (concluding
2 that if a CATV were also deemed to be a telephone line, “section 7901 . . . probably would
3 require that cable be considered part of the statewide franchise and *thus exempt from local*
4 *franchising*”) (emphasis added). The Attorney General’s opinion is consistent with general
5 state law principles that preclude local governments from interfering with state-authorized
6 operations. As the California Public Utilities Commission summarized in *In re Backman*
7 *Water Co.*,

8 Even when a city has the general power to regulate an activity normally
9 conducted by both utilities and nonutilities, that power cannot be exercised to
10 prevent a utility from commencing a state-authorized operation. (*Harbor*
11 *Carriers, Inc. v Sausalito* (1975) 46 CA 3d 773.). . . . An attempt to use the
franchise as a second certificate of public convenience and necessity is not a
use of the power in the manner prescribed by law; *the franchise power cannot*
govern any topic already governed by statewide law.

12 5 CPUC2d 358 (1981); 1981 Cal. PUC LEXIS 458, at 24-25 (1981) (emphasis added). See
13 also Cal. Const., art. § 7 (providing that a “county or city may make and enforce within its
14 limits all local, police, sanitary, and other ordinances and regulations *not in conflict with*
15 *general laws*”) (emphasis added); *Tily B., Inc. v. City of Newport Beach*, 69 Cal. App. 4th 1,
16 19 (1998) (holding that local law is preempted where it “duplicates, contradicts or enters an
17 area fully occupied by general laws, either expressly or by implication”).

18 If the California Legislature, in enacting Government Code §53066 *et seq.*, had
19 intended to deprive telephone companies of their right to use their lines to transmit any form
20 of electronic communications without a local franchise (which AT&T strongly disputes), this
21 intention could not be given effect because the § 7901 franchise “constitutes a binding
22 contract based on adequate consideration, and that *the vested right established thereby*
23 *cannot be impaired by subsequent acts of the Legislature.*” *County of Los Angeles v.*
24 *Southern California Tel. Co.*, 32 Cal. 2d 378, 384-85 (1948) (emphasis added); *Petaluma v.*
25 *Pac. Tel. & Tel. Co.*, 44 Cal. 2d 284, 288-289 (1955) (“[B]y constructing, maintaining and
26 operating telephone lines, [the utility] acquired a state franchise to use the streets and other
27 public places in the city for telephone lines and equipment. The state franchise rights thus
28 acquired were vested rights which *could not be impaired by a subsequent delegation of*

1 *power to the city . . .*” (emphasis added)); *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106,
2 120 (1911) (affirming that the state telecommunications franchise, once accepted, “became a
3 contract between the company and the state, secured by the constitution of the United States
4 against impairment by any subsequent state legislation”). It is unlikely that the Legislature in
5 enacting cable laws pertaining to CATV intended to eviscerate or limit the § 7901 rights of
6 telephone corporations in California or cause an unconstitutional impairment of existing
7 contract rights.⁶

8 C. The Federal Cable Act Also Does Not Authorize the City to Locally Franchise
9 AT&T’s IP Video Services.

10 Title VI of the Telecommunications Act of 1996 (the “Cable Act”) “leaves to state
11 law most questions about the regulation and taxation of cable TV franchises.” *City of*
12 *Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901, 905 (7th Cir. 2004). Indeed,
13 47 U.S.C. § 556(b) expressly provides that “[n]othing in this title shall be construed to
14 restrict a State from exercising jurisdiction with regard to cable services consistent with this
15 title.” Even assuming *arguendo* that AT&T’s IP video service could be categorized as “cable
16 services” being provided over a “cable system” within the meaning of federal cable law,⁷ the
17 question of whether the State of California or its municipalities have the authority to issue the
18 franchise required under the Cable Act is a matter of state, not federal law, provided that such
19 state law is consistent with the Cable Act.

20 The Cable Act does not require *local* franchising; it requires that a cable company
21 obtain a franchise from the “franchising authority.” 47 U.S.C. § 541. The term “franchising
22 authority” is not limited to *cities*; rather, it includes “any governmental entity empowered by
23 Federal, State, or local law to grant a franchise.” 47 U.S.C. § 522(10). Equally important, a
24

25 ⁶ AT&T’s Eighth Claim is for an unconstitutional impairment of its franchise rights under
26 § 7901. Compl. ¶¶ 82-92. However, the Court need not reach this claim since we believe it
should hold that the CATV statutes do not apply to a § 7901 franchisee.

27 ⁷ AT&T’s Second Claim alleges that its IP video services do *not* constitute “cable
28 services” for purposes of the Cable Act. Compl. ¶¶ 44-55. However, as discussed above, the
Court need not reach this claim for purposes of the present summary judgment motion.

1 “franchise” for purposes of the Cable Act need not take the form of a formal franchise
2 agreement but means simply an “initial authorization . . . issued by a franchising authority,
3 whether such authorization is designated as a franchise, permit, license, resolution, contract,
4 certificate, agreement, or otherwise, which authorizes the construction or operation of a cable
5 system.” 47 U.S.C § 522(9). Specifically, to satisfy the franchise requirements of the Cable
6 Act, the franchise in question must be construed to authorize the franchise “to construct[] a
7 cable system over public rights-of-way.” 47 U.S.C. § 541(a)(2). For AT&T—a telephone
8 company—§ 7901 fulfills these requirements.

9 Typically, cable companies obtain the franchises authorizing them to construct and
10 operate their systems from local governments—because *they* must *construct a cable system*,
11 and necessarily need local consent to access public rights-of-way. Nothing in the Cable Act,
12 however, requires *states* to use this procedure.⁸ By operation of § 7901, the State of
13 California has given broad authorization to telephone companies, such as AT&T, to use the
14 public rights-of-way to construct their telephone lines (whether or not such lines also
15 constitute a “cable system”), and to use such lines interchangeably to transmit *any form* of
16 electronic communications service (including transmission of television signals), without
17 local franchising. *City of Los Angeles, supra*, 44 Cal.2d at 282. Thus, even assuming that
18 AT&T’s telephone lines could be considered a cable system for purposes of federal law
19 (which AT&T disputes), AT&T operates today with a legally sufficient franchise, conferred
20 by the State, to construct and operate that system in California. As such, AT&T’s existing
21 franchise under § 7901 satisfies federal cable franchise requirements if and to the extent that

23 ⁸ As permitted by the Cable Act, several states have elected to designate a state entity, such
24 as a public utilities commission, as the franchising authority in lieu of permitting local
25 franchising. For example, in Connecticut, cable operators have long been franchised by the
26 Connecticut Department of Public Utilities, which has exclusive jurisdiction over cable
27 television and is the franchising authority in that state. *See* Conn. Gen. Stat. §§ 16-331-333J
28 (1988 & Supp. 1990). Similarly, in Delaware, the state public utilities commission is the sole
franchising authority for cable systems operating in unincorporated areas. Del. Code Ann.,
title 26, §§ 601 to 616 (1989). And in Hawaii, exclusive authority for the regulation of cable
television is vested in the Director of Commerce and Consumer Affairs. Haw. Rev. Stat.,
§§ 440G-1 to 16 (Supp. 1990).

1 such were deemed to be applicable. Nothing in the Cable Act authorizes a local municipality
2 to impose a second tier of cable franchising on AT&T when it already possesses a state
3 franchise satisfying 47 U.S.C. § 541. Indeed, at least one court has held that such “second
4 tier” franchising conflicts with, and is thus preempted by, the Cable Act. *See Liberty*
5 *Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005).

6 In short, the City’s attempts to franchise AT&T’s video services are preempted under
7 § 7901 and are not authorized under either state or federal cable law. The Court should
8 accordingly enter an order holding that the City has no authority to require AT&T to obtain a
9 local cable franchise because under § 7901 AT&T is “entitled to use its lines interchangeably
10 for transmitting telephone messages . . . television broadcasts . . . and any other communi-
11 cation service by means of the transmission of electrical impulses,” including cable services.
12 *City of Los Angeles, supra*, 44 Cal.2d at 282. California cable law (Gov. Code § 53066) is
13 inapplicable to AT&T, and AT&T’s § 7901 franchise satisfies the franchise requirement
14 under 47 U.S.C. § 541 to the extent that it even applies.

15 V. CONCLUSION.

16 For each of the foregoing reasons, the Court should grant AT&T’s motion for
17 summary judgment on the first, third and ninth claims.

18 Dated: March 17, 2006.

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